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No. 03-394

Supreme Court, U.S.
FILED
OCT 15 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AMBASE CORPORATION,
A Delaware Corporation,

Petitioner,

v.

CITY INVESTING COMPANY LIQUIDATING TRUST, as successor to City Investing Company, a dissolved Delaware Corporation, JOHN J. QUIRK, Trustee of City Investing Company Liquidating Trust, MARION SCHARFFENBERGER, Executrix of the Estate of George T. Scharffenberger, EBEN W. PYNE, Individually and as Trustee of the City Investing Company Liquidating Trust, and LESTER J. MANTELL, Individually and as Trustee of the City Investing Company Liquidating Trust,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CRAVATH, SWAINE &
MOORE LLP
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1000

Paul M. Dodyk
Counsel of Record
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1214

Attorneys for Respondents City Investing Company Liquidating Trust, John J. Quirk, Marion Scharffenberger, Eben W. Pyne and Lester J. Mantell

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Respondents City Investing Company Liquidating Trust, John J. Quirk, Marion Scharffenberger, Eben W. Pyne and Lester J. Mantell respectfully request that this Court deny AmBase Corporation's petition for a writ of *certiorari* because the opinion of the Court of Appeals for the Second Circuit below, *see* Petitioner's Appendix ("Pet. App.") at 1a – 24a, raises no issue worthy of review by this Court.

PERTINENT STATUTORY PROVISIONS

Section 202 of the New York Civil Practice Law and Rules (2003) provides that:

> "An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply."

COUNTERSTATEMENT OF THE CASE

This case arises out of a much-belated attempt by petitioner AmBase Corporation ("AmBase") to avoid its contractual obligation to pay (or defend against) certain alleged income tax liabilities of City Investing Company ("City") (the "Income Tax Obligation"), which AmBase had been defending against since 1986. In connection with City's liquidation in 1985, City entered into an Assignment and Assumption Agreement (the "Assignment Agreement") with its then-subsidiary AmBase pursuant to which City paid AmBase $178,767,000 to assume liability for City's income tax obligations and certain other obligations. The Income Tax Obligation arose from an I.R.S. Revenue Agent's Report delivered to AmBase in 1986. For well over a decade, AmBase acted as though it was solely responsible for the

Income Tax Obligation. It was not until the year 2000—some 14 years later—that AmBase first asserted that it had not in fact assumed City's Income Tax Obligation when it agreed to the 1985 Assignment Agreement.

In seeking to avoid its liability for City's Income Tax Obligation, AmBase first filed suit against City Investing Company Liquidating Trust ("City Trust" or the "Trust") in the Delaware Chancery Court in August 2000. On December 14, 2000, Vice Chancellor Leo E. Strine dismissed all of AmBase's claims as barred by the Delaware statute of limitations and the doctrine of laches. Respondents' Appendix ("Resp. App.") at A-4 – A-5. Vice Chancellor Strine subsequently denied AmBase's petition for reconsideration in a blistering opinion dated February 7, 2001. *See* Pet. App. at 38a – 54a.

The Delaware Chancery Court found that AmBase "could have brought this action against the Trust as early as 1986", because that was when AmBase began to incur costs in defending against the I.R.S. assertion of the Income Tax Obligation. Pet. App. at 43a – 44a. The Chancellor also rejected all of AmBase's arguments to toll the running of the statute of limitations, noting "how thin AmBase's equitable tolling argument seemed to be". Pet. App. at 47a. The Court found that all AmBase had to do to ascertain any claim it might have had in 1986 was to review the Assignment Agreement and the Internal Revenue Code, that "[n]either the Assignment Agreement nor the I.R.S. Code are secret documents" and that had there been any doubt as to its obligations, any "diligent" board would have conducted a timely, independent inquiry into AmBase's responsibility to pay the Income Tax Obligation. Pet. App. at 48a.

Chancellor Strine also rejected AmBase's attempt to excuse its delay by making unsupported accusations against certain AmBase directors and employees who had also been

Trustees of City Trust. Chancellor Strine found that these directors, who had served as directors of City and AmBase before the liquidation, came to serve on the AmBase Board under "the least suspicious of circumstances", had no financial incentive to favor the Trust over AmBase and at no point in time controlled AmBase. Pet. App. at 46a – 47a. The Chancellor also found that the two AmBase directors who were Trustees of City Trust left the AmBase Board seven-and-a-half years before the Delaware suit was filed, while another Trustee who had served as an AmBase employee and consultant left AmBase three-and-a-half years before the suit was filed. Pet. App. at 40a. Because AmBase's claims had accrued in 1986, because the relevant Delaware periods of limitation were not longer than three years and because all AmBase officers and directors who had any affiliation with City Trust had left AmBase more than three years before the suit was filed, the Delaware Chancery Court dismissed all of AmBase's claims under Delaware's statute of limitations and the Delaware doctrine of laches. Pet. App. at 50a – 51a.

AmBase then appealed Chancellor Strine's dismissal Order to the Delaware Supreme Court and simultaneously filed this action in the United States District Court for the Southern District of New York on January 30, 2001, where it was assigned to the Hon. Louis L. Stanton. City Trust filed no answer in the New York litigation. On February 23, 2001, City Trust filed a motion to dismiss under Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 12, arguing that AmBase's claims were barred by the statute of limitations and the doctrine of laches and that AmBase was precluded by Chancellor Strine's opinion in Delaware. Confronted with a motion to dismiss, AmBase withdrew its Delaware appeal, changed its New York counsel mid-stream and filed two separate waves of briefs opposing City Trust's motion to dismiss in the District Court.

City Trust's motion to dismiss AmBase's New York action sought its dismissal "on the grounds of the statute of limitations and laches". Resp. App. at A-7. City Trust's brief relied heavily on Chancellor Strine's decision in Delaware. In the second sentence of the brief, City Trust stated: "*This action has already been dismissed on those grounds by the Delaware Chancery Court.*" Resp. App. at A-7 (emphasis added). City Trust relied on Chancellor Strine's opinion throughout its brief and argued that AmBase was precluded from relitigating the matters decided by Chancellor Strine. *See* Resp. App. at A-9 – A-10; A-13 – A-19. Both City Trust and AmBase consistently regarded all Delaware law issues as resolved by Chancellor Strine's opinion and addressed their arguments to the New York statute of limitations. At no point in the courts below did AmBase ever suggest that the Delaware Chancery decision had not conclusively determined the Delaware law issues. Assuming that the Delaware law issues had been conclusively determined by Chancellor Strine's decision, City Trust focused its argument in the District Court on the New York law issues; the Trust argued that AmBase's causes of action accrued not later than 1986 when AmBase began to incur expenses in defending against the I.R.S. assertion of the Income Tax Obligation and that AmBase was collaterally estopped from challenging that view by Chancellor Strine's findings. *See* Resp. App. at A-10 ("Because Chancellor Strine found that . . . AmBase could have brought this action as early as 1986, AmBase is bound by that accrual decision and estopped from relitigating that issue here.").

City Trust countered AmBase's anticipated tolling argument by arguing that AmBase could not plead reasonable diligence because "AmBase . . . is estopped by Chancellor Strine's findings". Resp. App. at A-16. City Trust also argued that any AmBase claim of tolling would be subject to the two-year period of limitations imposed by New York C.P.L.R. 203(g) and that AmBase was collaterally estopped

from claiming any equitable tolling beyond December 1996 by Chancellor Strine's findings that "no later than December 1996 AmBase was on full inquiry notice". Resp. App. at A-17.

Contrary to its arguments to this Court, AmBase was well aware of City Trust's reliance on the preclusive effects of Chancellor Strine's decision throughout the proceedings below. In its brief in opposition to City Trust's motion to dismiss in the District Court, AmBase stated: "Principally, the Defendant [City Trust] argues that AmBase is precluded from bringing the instant action by a recent decision by the Delaware Chancery Court dismissing a similar action brought by AmBase . . . ." Resp. App. at A-22. And again: "The Defendant [City Trust] . . . even goes so far as to assert that [the Delaware decision] *precludes* this Court from allowing this action to proceed." Resp. App. at A-25 (emphasis in original).

In AmBase's supplemental opposition brief filed in the District Court, AmBase argued that "[t]he decision of the Delaware Chancery Court has no preclusive effect". Resp. App. at A-29. In support of that argument, AmBase argued that because the Delaware Chancellor's statute of limitations ruling is "not a ruling on the merits", it should not be given preclusive effect. Resp. App. at A-30. In arguing that "this Court should not give any preclusive effect to the *findings* of the Delaware Court", AmBase admits that the issue being addressed by AmBase and City Trust in the District Court was the preclusive effect of the Chancellor's *findings of fact*, in the context of City Trust's argument based on the New York statute of limitations, not the res judicata effect of the Delaware decision. Resp. App. at A-32 (emphasis added).

It was in that context that City Trust distinguished between the collateral estoppel and res judicata aspects of

Chancellor Strine's decision, arguing that AmBase's "on the merits" assertions were irrelevant to City Trust's collateral estoppel arguments, and pointing out that City Trust's collateral estoppel argument was not a res judicata argument. At no time during the course of its many arguments in the District and Circuit Courts did AmBase ever question the proposition that the Delaware Chancellor's opinion had conclusively determined that AmBase's claims were time-barred under the Delaware statute of limitations and preclusive as to that question. At no time did City Trust give any indication that it was abandoning its reliance on the Delaware decision as preclusive of relitigation of any Delaware law limitations issue.

Judge Stanton decided to base the District Court's dismissal of AmBase's claims on the New York statutes of limitation and on his own review of the pleadings. *See* Pet. App. at 25a – 37a. Like Chancellor Strine, Judge Stanton decided that AmBase's causes of action accrued in 1986 and that any equitable estoppel argument AmBase might have had expired in December 1996, by which time the one AmBase employee and two AmBase directors who had any City Trust affiliation had left AmBase. Pet. App. at 32a – 34a. Judge Stanton decided that all but one of AmBase's claims were barred by C.P.L.R. §§ 213(2) and (7), the relevant New York statutes of limitation, and that AmBase's remaining claim of indemnification was unsupported by the terms of the Assignment Agreement and therefore failed to state a cause of action. Pet. App. at 31a – 37a. (The Delaware Chancery Court had dismissed AmBase's indemnification argument for the same reason. *See* Resp. App. at A-2 – A-3.) Judge Stanton found that any equitable tolling claim AmBase might have had expired in December 1996, and held that C.P.L.R. 203(g) required AmBase to file within two years of that date, or by December 1998. Pet. App. at 32a – 34a. Since AmBase had not sued until January 30, 2001, Judge Stanton dismissed AmBase's

New York lawsuit as time-barred by the New York statute of limitations. Pet. App. at 32a – 34a. AmBase then filed a motion for reconsideration which Judge Stanton denied on February 14, 2002. *See* Pet. App. at 17a.

AmBase once again changed its counsel and appealed to the United States Court of Appeals, arguing that Judge Stanton had misconstrued New York law in dismissing AmBase's Complaint as time-barred. Once again, AmBase recognized that City Trust was relying on the "preclusive effect" of "the decision of the Delaware Court". Resp. App. at A-43. AmBase's appeal brief was largely devoted to the specious argument (not made by AmBase's counsel in the District Court) that AmBase's fiduciary duty claims did not accrue under the applicable New York statute of limitations (C.P.L.R. § 213(7)) until all AmBase employees who had any relationship with City Trust had left AmBase's employ, *see* Resp. App. at A-49 – A-51, despite clear authority holding that AmBase's newly-invented tolling argument was inapplicable to claims of breach of fiduciary duty by corporate officers and directors. *See, e.g., Whitney Holdings Ltd. v. Givotovsky*, 988 F.Supp. 732, 741-45 (S.D.N.Y. 1997); *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 744-45 (2d Cir. 1979). The balance of AmBase's argument was devoted to the equally baseless argument that its time-barred contract-based claims were resurrected every time AmBase incurred any additional expense alleged to arise from City Trust's alleged 1986 breach of contract, *see* Resp. App. at A-44 – A-49, despite a plethora of authority holding that all of AmBase's claims under any conceivably applicable theory of law accrued in 1986. *See, e.g., Whitney*, 988 F.Supp. at 743; *Selkirk v. State*, 671 N.Y.S.2d 824, 825 (App. Div. 1998); *Lowell Wiper Supply Co. v. Helen Shop, Inc.*, 235 F. Supp. 640, 644 (S.D.N.Y. 1964). Conspicuously absent from AmBase's Court of Appeals brief was any suggestion that the Delaware Chancery decision did not

conclusively determine the time-barred status of AmBase's claims under the Delaware law of limitations.

Under § 202 of the New York C.P.L.R. (2003), the courts of the state of New York are instructed that:

> "An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply."

In other words, if a non-resident sues in New York, the state courts will apply the shorter of the New York period of limitations or that of the state where the cause of action accrued. AmBase is a Delaware corporation and had no office in New York at any relevant time. AmBase is, therefore, a non-resident of New York. Under New York law, a cause of action alleging economic loss accrues in a corporation's state of incorporation. *See, e.g., Global Fin. Corp. v. Triarc Corp.*, 715 N.E.2d 482, 485 (N.Y. 1999) (action accrues in state of residence); *Am. Lumbermens Mut. Cas. Co. of Ill. v. Cochrane*, 129 N.Y.S.2d 489, 491 (Sup. Ct. 1954) (corporation is resident of state of incorporation), *aff'd*, 134 N.Y.S.2d 473 (App. Div. 1954), *aff'd*, 133 N.E.2d 461 (N.Y. 1956); *but see Official Comm. of Asbestos Claimants of G.I. Holding, Inc. v. Heyman*, 277 B.R. 20, 30 (S.D.N.Y. 2002). In this case, that means a New York state court would apply the shorter of the periods of limitation of New York or Delaware. Because Delaware's relevant period of limitations is three years, *see* Del. Code Ann. tit. 10, § 8106 (2003), and New York's is six years, *see* C.P.L.R. § 213 (2003), New York C.P.L.R. § 202 would mandate the application of Delaware law to this case.

The Court of Appeals decided to affirm Judge Stanton's dismissal of AmBase's action on grounds other than those relied on by Judge Stanton, as it was clearly entitled to do. *See, e.g., Thigpen v. Roberts*, 468 U.S. 27, 28 (1984); *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 166 n.8 (1977); *MFS Sec. Corp. v. N.Y. Stock Exch., Inc.*, 277 F.3d 613, 617 (2d Cir. 2002) (citing *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 63 (2d Cir. 1997)). The Court took as its point of departure the cases of *Loving v. Pirelli Cable Corp.*, 11 F.Supp.2d 480 (D.Del. 1998), *aff'd*, 178 F.3d 1279 (3d Cir. 1999), and *Williamson v. Columbia Gas and Elec. Corp.*, 91 F.Supp. 874 (D.Del. 1950), *aff'd*, 186 F.2d 464 (3d Cir. 1950). Both *Loving* and *Williamson* involved the question of whether a decision that the plaintiff's lawsuit was barred by the Delaware statute of limitations precluded the plaintiff from relitigating that issue in a subsequent lawsuit. Not surprisingly, both courts reached the conclusion that relitigation of the Delaware limitations issue was barred by res judicata. The Delaware Supreme Court reached the same result as to Delaware's statute of limitations in *Townsend v. Chasanov*, No. 129, 1995 Del. LEXIS 367 (Oct. 11, 1995):

> "It is well settled that a plaintiff who receives a decision on the merits of a controversy from a court of competent jurisdiction is precluded thereafter by the doctrine of res judicata from bringing a subsequent action in another court based upon the same matter. . . . We therefore agree with the Superior Court's holding that Townsend's later lawsuit was barred by the doctrine of res judicata." 1995 Del. LEXIS 367, at * 2 – * 3.

Following these cases, the Second Circuit applied Delaware law to AmBase's New York action and held that AmBase was precluded from relitigating whether its claims were time-barred by Delaware law. Since Delaware law is applicable to AmBase's claims under § 202 of the C.P.L.R. (because AmBase was not a resident of New York, because AmBase's

breach of contract claims accrued in Delaware and because Delaware's relevant statute of limitations is shorter), the Second Circuit's decision holding that AmBase is barred from relitigating the Delaware statute of limitations issue by the preclusive effect of Chancellor Strine's decision is clearly correct. Since C.P.L.R. § 202 mandates the application of either the law of Delaware or the law of New York and since Judge Stanton held that AmBase's claims were time-barred under the New York statute of limitations, the result in this case would be the same even if Delaware law did not apply—dismissal of AmBase's lawsuit as time-barred.

SUMMARY OF THE ARGUMENT

Petitioner AmBase comes to this Court after: (1) the Delaware Chancery Court (Hon. Leo E. Strine, Jr.) dismissed its Delaware action because AmBase's claims against City Trust are barred by the Delaware statute of limitations and the doctrine of laches; (2) the United States District Court for the Southern District of New York (Hon. Louis L. Stanton) dismissed AmBase's New York action because its claims are barred by the New York statute of limitations; and (3) the United States Court of Appeals for the Second Circuit correctly decided that Delaware law applied, accorded res judicata effect to the decision of the Delaware Court and affirmed the dismissal of AmBase's New York action.

In cases brought by non-resident plaintiffs, the courts of the State of New York apply the shorter of the statute of limitations of New York or the statute of the state in which the cause of action accrued, under C.P.L.R. § 202.[1] Since

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[1] C.P.L.R. § 202: "An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued

AmBase is a Delaware corporation that had no place of business in New York at any relevant time, and AmBase's causes of action for economic loss accrued in its state of incorporation, Delaware, New York courts would apply the statute of limitations of either New York or Delaware. *See, e.g.*, *Triarc Corp.*, 715 N.E.2d at 485; *Cochrane*, 129 N.Y.S.2d at 491. AmBase has never argued that the statute of any other state should apply. Since the relevant Delaware period of limitations is three years, while the New York period is six years, New York courts would apply Delaware law to this case.

This is exactly what the Court of Appeals did in applying Delaware law and according preclusive effect to the Delaware Chancery decision dismissing AmBase's action under Delaware's statute of limitations. Even if the Second Circuit somehow erred in applying Delaware law, it would make no difference to the outcome of this case because AmBase's action would then be governed by New York law and Judge Stanton, sitting in the Southern District of New York, applied New York law and correctly found that AmBase's action was barred by the New York statute of limitations. AmBase's complaint has thus been dismissed as time-barred under the laws of both states whose laws could be applicable to this case under C.P.L.R. § 202. Should AmBase now wish to claim that the law of some third state should apply to the timeliness of its claims, the short answer is that AmBase has never before made such a claim and is, therefore, barred from raising that issue now. All of which raises the question why this case is now before the Supreme Court of the United States.

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in favor of a resident of the state the time limited by the laws of the state shall apply."

AmBase claims that we are here because the Second Circuit's reliance on the res judicata principle was barred by Fed. R. Civ. P. 8(c), which requires that a defendant's answer plead any available defense of res judicata, and because the Circuit Courts are in conflict over the consequences of a defendant's failure to so plead. AmBase is wrong.

City Trust never filed an answer in this case. Rule 8(c), which is limited to the "pleadings" enumerated in Fed. R. Civ. P. 7(a), is therefore inapplicable. City Trust filed a motion under Fed. R. Civ. P. 12, which is not a "pleading", seeking dismissal of AmBase's action because it was time-barred. Rule 12 does not require that the moving party join an available res judicata motion when it moves to dismiss on other Rule 12 grounds. To the contrary, Rule 12(h)(1) only requires a party who makes a Rule 12 motion to move on all available personal jurisdiction, venue, process and service of process grounds, on pain of waiver. Rules 12(g) and 12(h)(2) expressly provide that the defense of failure to state a claim under Rule 12(b)(6), pursuant to which res judicata and statute of limitations defenses are customarily made, is not waived and may be made even during the trial on the merits. The express language of Rule 12 therefore leaves no room for any argument that the omission of an available res judicata or statute of limitations defense from a Rule 12 motion operates as a waiver of that defense.

AmBase also claims that City Trust decided for some mysterious reason to surrender its right to rely on the res judicata effect of the judgment that the Trust had earlier secured from the Delaware Chancery Court at considerable effort and expense. City Trust did no such thing.

AmBase knew from the outset of the New York litigation that City Trust sought to rely on whatever preclusive effect the Trust could derive from the Delaware decision. As AmBase admitted in its brief in opposition to

the Trust's motion to dismiss in the Southern District of New York: "The Defendant [City Trust] . . . even goes so far as to assert that [the Delaware Chancery Opinion] *precludes* this Court from allowing this action to proceed." *See* Resp. App. at A-25 (emphasis in original). Indeed, City Trust built its entire motion to dismiss in the District Court around the preclusive effect of Chancellor Strine's Delaware Chancery Opinion.

AmBase's argument before this Court is based on its distortion of City Trust's response to AmBase's argument below that the Trust could not rely on the preclusive effect of factual findings made by the Delaware Chancellor, in the context of an argument based on the New York statute of limitations. AmBase argued that the Delaware statute of limitations decision was not a decision "on the merits" and so did not qualify for res judicata treatment. The Trust responded, in the context of its argument based on the New York statute of limitations, that it was asserting that AmBase was barred from relitigating certain factual determinations by principles of collateral estoppel. It was in that limited context that City Trust stated it was not relying on a res judicata argument. By ignoring the limited nature of the Trust's res judicata comments and their limiting context, AmBase misleadingly distorts the meaning of the Trust's collateral estoppel argument. To suggest that an argument made by City Trust in support of its right to make preclusive use of the Delaware decision for collateral estoppel purposes manifested its intention to abandon reliance on the res judicata implications of that decision is nothing short of bizarre.

AmBase attempts to transform its attack on the Second Circuit's Delaware law decision into a denial by the Second Circuit of full faith and credit. Whatever else may be said of the Second Circuit's decision, it is not a denial of full faith and credit. To the contrary, the Second Circuit did its best to

determine and apply Delaware law and its efforts to do so, whether right or wrong, cannot constitute a denial of full faith and credit. *See Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining and Milling Co.*, 243 U.S. 93, 96 (1917) (Holmes, J.).

The Second Circuit simply applied Delaware law to AmBase's New York action and held that the Delaware Chancery decision barred AmBase from relitigating whether AmBase's claims were barred by the Delaware statute of limitations. Both of these decisions are unquestionably correct. Under C.P.L.R. § 202, the Delaware statute of limitations applies to this case. And under widely-accepted principles of res judicata and collateral estoppel, the Delaware Chancery Court decision precludes AmBase from relitigating the Delaware limitations issue in the Southern District of New York.

AmBase cites no case law or other authority which in any way supports its argument that it should be permitted to relitigate the time-barred status of its claims under Delaware law. Nor does AmBase suggest any reason that it should be permitted to do so.

Although AmBase argues that it has been deprived of due process, AmBase invokes no applicable exception to the well-established law which empowers a Circuit Court to affirm a District Court decision on any ground supported by the record. *See, e.g., Thigpen*, 468 U.S. at 28; *New York Tel. Co.*, 434 U.S. at 166 n.8; *MFS Sec. Corp.*, 277 F.3d at 617; *Shumway*, 118 F.3d at 63. AmBase's only arguments in support of its due process claim are based on Fed. R. Civ. P. 8(c), which does not apply to this case, and on an alleged waiver which never took place.

Nor did the process of the Second Circuit deprive AmBase of any meaningful right. AmBase was granted ample opportunity to argue that its claims were not barred by

the Delaware statute of limitations in the Delaware Chancery Court. In this case, District Judge Stanton gave AmBase a generous opportunity to argue that its rights were not barred by New York law, to the point of allowing a supplemental wave of briefing when AmBase changed its legal horses mid-stream and proceeding to address the issue a third time on AmBase's petition for reconsideration. After due consideration by the Delaware Chancery Court and the District Court below, AmBase's lawsuit was dismissed by both of those courts as time-barred by the statutes of limitation of Delaware and New York. Since the only laws applicable to AmBase's claims under C.P.L.R. § 202 are those of Delaware or those of New York, AmBase has surely had all of the process which it is due.

REASONS FOR DENYING AMBASE'S PETITION FOR A WRIT OF CERTIORARI

I. RULE 8(C) OF THE FEDERAL RULES OF CIVIL PROCEDURE DOES NOT APPLY TO THIS CASE.

The principal reasons AmBase advances for granting *certiorari* in this case are that the Second Circuit supposedly transgressed Fed. R. Civ. P. 8(c) in affirming the dismissal of AmBase's New York action and that the Circuit Courts of Appeal are conflicted over whether a Court of Appeals may consider on appeal an issue that a party has waived under Rule 8(c). The short answer is that Rule 8(c) does not apply to this case because City Trust did not file an answer. Rule 8(c) requires a defendant who files an answer to plead certain enumerated defenses, including res judicata. Rule 8(c) is applicable only to "pleadings". Fed. R. Civ. P. 7(a), which defines that term, refers only to complaints, answers, answers to crossclaims, replies to counterclaims and third party complaints and answers. Rule 7(a) does not include Rule 12 motions in its definition of "pleadings". *See, e.g., Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l*

Planning Agency, 216 F.3d 764, 788 (9th Cir. 2000) ("A motion to dismiss is not a pleading."); *Maldonado v. Dominguez*, 137 F.3d 1, 11 n.8 (1st Cir. 1998) (same); *Miles v. Dep't of the Army*, 881 F.2d 777, 781 (9th Cir. 1998) (same).

City Trust filed a motion to dismiss under Rule 12 seeking dismissal of AmBase's New York action on statute of limitations and laches grounds. Rule 12(h)(1) provides that a party making a Rule 12 motion waives any available personal jurisdiction, improper venue, insufficiency of process or insufficiency of service of process defense that it does not raise in that motion. Rule 12 does not provide that the omission of an available res judicata ground for dismissal from a Rule 12 motion constitutes a waiver of the res judicata defense. The fact that Rule 12(h)(1) enumerates the specific defenses that are waived if not raised in a Rule 12 motion and that res judicata and statute of limitations defenses are not among them leaves no room for any argument that an omitted res judicata ground for dismissal is waived under Rule 12, particularly given the long-standing federal policy against imposing waivers of substantive right upon litigants under uncertain or ambiguous circumstances. As AmBase concedes in its petition, "waiver is the '*intentional* relinquishment or abandonment of a known right'". *See* Petition for Writ of Certiorari, dated September 10, 2003 ("Pet."), at 19 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) (emphasis added); *see also D. H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 185-86 (1972); *Kirkland & Ellis v. CMI Corp.*, No. 95 C 7457, 1999 WL 92257, at * 12 (N.D. Ill. Feb. 11, 1999).

Rule 12(g) provides that if a party makes a Rule 12 motion and omits available Rule 12 defenses from the motion, that party may not make a second Rule 12 motion, subject to certain exceptions. Under Rule 12(g), the only consequence of omitting an available defense is the inability

to file a second Rule 12 motion—not waiver of the defense. Even more importantly, Rule 12(g) excepts motions covered by Rule 12(h)(2) from its ambit. Rule 12(h)(2) provides that the defense of failure to state a claim under Rule 12(b)(6) may be made in any pleading permitted or ordered under Rule 7, by a motion on the pleadings or even *at the trial on the merits*. Since defenses based on res judicata or statutes of limitation are customarily asserted as Rule 12(b)(6) defenses, Rules 12(g) and 12(h)(2) make it clear that any such defense is not waived by omission from a Rule 12 motion.

Indeed, the Advisory Committee Notes to the 1966 Revision of Rule 12 expressly state that Rule 12(h)(2) was revised to make clear that the omission from a Rule 12 motion of an available Rule 12(b)(6) grounds for dismissal does not operate as a waiver:

> "It is to be noted that while the defenses specified in subdivision (h)(1) are subject to waiver . . . the more substantial defenses of failure to state a claim . . . and failure to state a legal defense to a claim . . . are expressly preserved against waiver by amended subdivision (h)(2) and (3)."

As the Second Circuit observed in *Santos v. Dist. Council of New York City of United Brotherhood of Carpenters*, 619 F.2d 963 (2d Cir. 1980):

> "By the express terms of Rule 12(h)(2), a 12(b)(6) defense 'may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment or the pleadings, or at the trial', and, by the express terms of Rule 12(g), is not waived by failure to include it in a Rule 12 motion raising other defenses." 619 F.2d at 967 n.4.

The relationship between Rule 8(c) and Rule 12 is not a novel question. All of the Circuit Courts that have decided the issue have unanimously held that Rule 8(c) is inapplicable to Rule 12 motions. *See, e.g.*, *Stanton v. D.C. Court of Appeals*, 127 F.3d 72, 77 (D.C. Cir. 1977) ("[W]e know of no case in which a court has prevented a party from pleading res judicata in its answer simply because it failed to do so in an earlier motion to dismiss."); *Santos*, 619 F.2d at 967; *Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency*, 992 F.Supp. 1218, 1223-26 (D. Nev. 1998), *aff'd in relevant part*, 216 F.3d 764, 787-89 (9th Cir. 2000). None of the Circuit Court cases cited by AmBase holds to the contrary.

In short, AmBase's principal argument for *certiorari*, *see* Pet. at 8-18, asks this Court to review an issue which is not part of this case. Since Rule 8(c) is addressed to "pleadings", such as an answer, and since City Trust never filed an answer in this case, Rule 8(c) is not applicable to this case. City Trust filed a motion to dismiss under Rule 12(b)(6). There is no provision in Rule 8, Rule 12 or any other Federal Rule which suggests that City Trust was required to raise an available res judicata defense in that motion. Indeed, the structure of Rule 12, requiring in Rule 12(h)(1) the raising of all personal jurisdiction, venue, process and service of process defenses, and expressly providing in Rules 12(g) and 12(h)(2) that 12(b)(6) defenses for failure to state claim, such as res judicata and statute of limitations defenses, need not be asserted in a Rule 12 motion made on other grounds, is fatally inconsistent with AmBase's waiver arguments.

II. AMBASE'S ARGUMENT THAT CITY TRUST WAIVED RELIANCE ON THE PRECLUSIVE EFFECT OF THE DELAWARE CHANCERY OPINION IS A DISTORTION OF THE RECORD.

AmBase's argument that City Trust waived reliance on the preclusive effect of Chancellor Strine's opinion as to Delaware law is a misleading distortion of the record and inconsistent with the positions taken by AmBase in the courts below. City Trust built its entire motion to dismiss in the District Court around the preclusive effect of Chancellor Strine's opinion. City Trust argued that the Delaware opinion collaterally estopped AmBase from relitigating two of Chancellor Strine's factual findings, which together doomed AmBase's New York action to dismissal under the New York statute of limitations—namely, that all of AmBase's causes of action accrued in 1986 and that any argument AmBase might have had for equitable tolling expired in December 1996. Resp. App. at A-9 – A-10; A-13 – A-19. Contrary to AmBase's posturing before this Court, AmBase was fully aware throughout this litigation that City Trust sought to rely on whatever preclusive effect the Trust could secure from Chancellor Strine's opinion. In the District Court, AmBase observed: "[P]rincipally, the Defendant [City Trust] argues that AmBase is precluded from bringing the instant action by a recent decision by the Delaware Chancery Court dismissing a similar action brought by AmBase . . . ." Resp. App. at A-22. In the Court of Appeals, AmBase again admitted that City Trust was relying on the "preclusive effect" of "the decision of the Delaware Court." Resp. App. at A-43.

In opposing City Trust's motion to dismiss in the District Court, AmBase argued that Chancellor Strine's opinion was not entitled to preclusive effect because it was not a decision "on the merits". Resp. App. at A-30. City Trust rejoined that AmBase's "merits" argument was

irrelevant because City Trust was arguing that AmBase was collaterally estopped from relitigating certain dispositive factual findings by Chancellor Strine which barred AmBase's actions under the New York statute of limitations. Resp. App. at A-36 – A-39. It was in that limited context that City Trust said that it was not arguing that Chancellor Strine's opinion was res judicata, as indeed the Trust was not. But that is a far cry from saying that City Trust had abandoned the argument that the Chancellor's opinion had conclusively resolved all Delaware law issues decided or was entitled to res judicata effect.

At no time did AmBase ever question that Chancellor Strine's opinion had conclusively determined all decided issues of Delaware law. At no time did City Trust suggest that it was abandoning any preclusive effect that it might derive from Chancellor Strine's decision. Indeed, in both the District Court and the Court of Appeals, City Trust insisted that AmBase's New York action should be dismissed because of the preclusive effect of the Delaware opinion. Since both parties regarded the Delaware law issues to have been resolved, the argument in the courts below focused on the collateral estoppel effects of the Chancellor's opinion in the context of the New York statute of limitations. City Trust's continuing insistence on the collateral estoppel effects of Chancellor Strine's opinion in the Courts below precludes any good-faith assertion by AmBase that it honestly believed that City Trust intended to waive any preclusive effect it could derive from Chancellor Strine's opinion.

This Court has repeatedly observed that a waiver of substantial rights should not be inferred from ambiguous circumstances. Rather, to sustain a claim of waiver the Court has required that the party against whom the waiver is asserted must be proved to have made a deliberate, informed decision to waive by unambiguous record evidence. *See e.g.*,

Zerbst, 304 U.S. at 464; *Frick Co.*, 405 U.S. at 185-86; *CMI Corp.*, 1999 WL 92257, at * 12.

In short, City Trust did not waive its right to rely on any of the preclusive effects of the Delaware Chancery decision and the record leaves no room for any good-faith claim on AmBase's part that AmBase ever believed that City Trust had intended any such waiver.

III. AMBASE'S DUE PROCESS ARGUMENT FAILS WITH ITS WAIVER AND RULE 8(C) ARGUMENTS.

AmBase itself admits that its due process argument collides with the long-standing rule that a Court of Appeals may affirm a lower court decision on any ground supported by the record. *See* Pet. at 18-19; *see also, e.g.*, *Thigpen*, 468 U.S. at 28; *New York Tel. Co.*, 434 U.S. at 166 n.8; *MFS Sec. Corp.*, 277 F.3d at 617; *Shumway*, 118 F.3d at 63. AmBase's attempt to avoid the consequences of that principle rests solely on its waiver and Rule 8(c) arguments, both of which are shown above to be baseless. *See* pp. 15 – 21, *supra*. AmBase's claim that it is entitled to constitutional protection of expectations supposedly engendered by City Trust's alleged waiver fails because the record conclusively proves that AmBase had no such expectations and that there is no basis in the record for a good-faith claim that AmBase ever had any such expectations.

Nor has AmBase been deprived of the opportunity for any hearing which could make any difference to the outcome of this case. Under § 202 of the C.P.L.R., the only limitations laws potentially applicable to this case are those of New York or Delaware. Lower courts have found AmBase's claims to be barred by the laws of both states. AmBase has never suggested that the limitations statute of any other state should apply, and it is too late to do so now.

AmBase's problem is that it is attempting to sue on claims that accrued in 1986 and has no basis for any equitable tolling argument beyond December 1996. Those two facts mean that any conceivably actionable claims AmBase may have had are time-barred by the laws of both Delaware and New York, as Chancellor Strine and District Judge Stanton found—as well as by the law of any other state known to counsel.

AmBase has been given the most generous opportunity to argue that its claims are not time-barred under the laws of Delaware or the laws of New York, including a second wave of briefing permitted by Judge Stanton when AmBase switched legal counsel mid-stream in the District Court and three petitions for reconsideration, each of which was denied. AmBase has therefore had ample opportunity to present argument on all of the issues necessary and sufficient for the dismissal of its claims. In short, AmBase has plainly had all of the process which it is due—some would say even more.

IV. THIS CASE INVOLVES PETITIONER'S ASSERTION THAT THE SECOND CIRCUIT MADE A MISTAKE IN INTERPRETING STATE LAW. THAT IS NOT A FULL FAITH AND CREDIT ISSUE.

In its attempt to secure this Court's review, AmBase misdescribes its attack on an interpretation of state law by the Second Circuit as a full faith and credit issue, which this case does not present. Whatever else might be said about the Second Circuit's opinion, it was clearly not a denial of full faith and credit to the laws of Delaware. The Second Circuit did not decline to follow what it perceived to be Delaware law. To the contrary, the entire thrust of the Second Circuit's opinion was an attempt to determine and to apply Delaware law. The fact that AmBase's counsel profess to disagree with what the Second Circuit has determined the law of

Delaware to be does not mean that the Second Circuit is in any sense denying Delaware law full faith and credit. Any contrary view would transform any petitioner's attack on a Circuit Court interpretation of a state law into a federal full faith and credit issue.

Except in the rarest of cases, this Court does not grant writs of *certiorari* to review Circuit Court interpretations of state law. *See, e.g.*, *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967) ("We do not ordinarily review the holding of a court of appeals on a matter of state law . . . ."); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944) ("[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts.") (citation omitted). AmBase's invocation of federal full faith and credit principles in this case is nothing more than an attempt to avoid that limitation and should be rejected out of hand.

As Justice Holmes observed in *Gold Issue Mining*, 243 U.S. at 96:

> "There is nothing to suggest that it [the Missouri Supreme Court] was not candidly construing the Colorado statutes to the best of its ability, and even if it was wrong, something more than an error of construction is necessary in order to entitle a party to come here under Article IV, § 1 [the Full Faith and Credit Clause]."[2]

The Delaware state courts have described their state's statutes of limitation in varying ways. For example, in

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[2] Although *Gold Issue Mining* dealt with the Full Faith and Credit Clause, this Court's practice of reviewing federal appellate court interpretations of state law only in extraordinary circumstances should apply equally to issues arising under the Full Faith and Credit Act.

Townsend, the Delaware Supreme Court described its statute of limitations in the following way:

> "It is well-settled that a plaintiff who receives a decision on the merits of a controversy from a court of competent jurisdiction is precluded thereafter by the doctrine of res judicata from bringing a subsequent action in another court based upon the same matter." 1995 Del. LEXIS 367, at * 2.

As this and other cases reveal, the proper characterization of any state's limitation laws is based on the particular form those laws take in that state as defined by state statutes and state case law. That particularity destroys any argument that the decision below conflicts with the decision of any other Circuit. AmBase points to no Circuit Court case that conflicts with the decision of the Second Circuit in construing Delaware law.

Inter-Circuit conflicts cannot be ascertained by asking whether Circuit opinions use the term "on the merits", as opposed to "substance and procedure", or by attempting to distinguish between what AmBase calls "deeper" inquiries and "shallower" inquiries. *See* Pet. at 23-30. Because the analysis of any state's statute of limitations is particular to that state, any attempt to find a conflict among different Circuit Court analyses by analyzing the infinitely varying language of their opinions is doomed to futility.

AmBase's assault on the cases relied upon by the Second Circuit in reaching its decision similarly raises no certiorable issue. In both *Loving* and *Williamson*, the federal courts applied Delaware statute of limitations law to federal causes of action and held that prior decisions holding the actions to be time-barred would be given "res judicata" effect and barred subsequent suits arising from the same allegations. Neither the *Loving* court nor the *Williamson* courts gave any

hint that their decisions depended on the fact that those cases involved the application of state limitations law to federal causes of action. Those courts did not suggest in any way that the outcome would have differed if the cases had involved state law claims. Indeed, the courts cited to generally-applicable principles of law which have been applied by both state and federal courts. *See, e.g.*, *Williamson*, 91 F. Supp. at 877-81, 186 F.2d at 466-70; *Loving*, 11 F. Supp. 2d at 490-92. There is therefore no reason to believe that any of those courts would have reached a different result in a diversity case involving state law claims.

AmBase's reliance on this Court's opinion in *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), is likewise beside the point because the *Semtek* case involved the relevance of Fed. R. Civ. P. 41(b) to the effect which should be given to the judgment of a federal court in a subsequent state court proceeding—a circumstance which is present neither in this case nor in *Loving* or *Williamson*, rendering AmBase's discussion of Rule 41(b) completely irrelevant to the issues at hand.

AmBase's most revealing error in its attempt to conjure a federal full faith and credit issue where there is none is its attempt to ignore the cases relied upon by the Second Circuit on the grounds that those cases address the preclusive effect of dismissals on statute of limitations grounds only in subsequent proceedings in courts of the same jurisdiction. There is absolutely nothing in any of those cases to indicate that any of those courts attributed any significance to that fortuity. The point made in all of those cases is that the dismissal of an action because it is time-barred under the law of Delaware precludes the litigant from relitigating that Delaware law issue in another court in any jurisdiction, whether of the same state or another, whether the subsequent court is state or federal. The cases so holding are legion and

uniform in result and provide no suggestion that their preclusion of the subsequent suit is in any way dependent on whether the later court is in the same state system as the earlier court. *See, e.g., Cahn v. United States,* 269 F.Supp.2d 537, 544-45 (D.N.J. 2003); *William Poultry Co. v. Richardson-Merrell, Inc.,* No. 4-75-Civ 413, 1975 WL 1001, at *2 (D. Minn. Dec. 22, 1975); *Atkinson v. Pittsgrove Township,* 471 A.2d 1215, 1217 (N.J. Super. Ct. Ch. Div. 1983); *Fender v. St. Louis Southwestern Ry. Co.,* 392 N.E.2d 82, 85 (Ill. App. Ct. 1979). AmBase seeks to ignore that fact because it is fatal to its petition and its case.

AmBase manages to get through its entire petition without once mentioning that under § 202 of the C.P.L.R. only the law of New York or the law of Delaware can be applied to determining the timeliness of its suit in the Southern District of New York. Since AmBase is a non-resident of New York, since the causes of action in this case accrued in Delaware and since the relevant Delaware statute of limitations is shorter, § 202 mandates the application of Delaware law, whether one accepts the Second Circuit's analysis or not. The Delaware Chancery Court has of course decided that AmBase's claims are time-barred under Delaware law and no one—not even AmBase here petitioning the fourth tribunal to consider these issues—has suggested any reason why it is not precluded from relitigating that issue. Finally, even if Delaware law for some reason does not apply, it would make no difference. The only other law which could be applicable is the law of New York, which District Judge Stanton applied and correctly decided barred AmBase from bringing this action in New York. All of which brings us back to the initial and still unanswered question of what this case is doing in the Supreme Court of the United States.

CONCLUSION

For the reasons stated, Respondents respectfully request that this Court deny the petition for *certiorari*.

October 15, 2003

Respectfully submitted,

Paul M. Dodyk
Counsel of Record
825 Eighth Avenue
New York, NY 10019
(212) 474-1214

CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Respondents City Investing Company Liquidating Trust, John J. Quirk, Marion Scharffenberger, Eben W. Pyne and Lester J. Mantell